

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

KEVIN D. EVANS

Claimant

V.

CESSNA AIRCRAFT CO.

Self-Insured Respondent

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Docket No. 1,062,821

ORDER

Respondent requested review of the September 29, 2016, post-award Order by Administrative Law Judge (ALJ) Thomas Klein.

APPEARANCES

Jeffrey K. Cooper, of Topeka, Kansas, appeared for the claimant. Travis L. Cook, of Wichita, Kansas, appeared for self-insured respondent.

RECORD AND STIPULATIONS

The Board has adopted the same stipulations and considered the same record as did the ALJ, consisting of the transcript of Preliminary Post-Award Hearing from September 22, 2016, with exhibits attached and the documents of record filed with the Division.

This matter appears to be before the Board on an appeal from a post-award decision by the ALJ wherein claimant was granted medical treatment with John Dickerson, M.D.. The attorney for respondent, at the hearing stated:

MR. BURNETT: Well, in addition there is jurisdictional issues for a Preliminary Hearing that are different than a post-award matter. So I am willing to stipulate to the medical records, but I don't want it to be considered a post-award matter which is considered final.¹

The attorney for claimant then recited the following at that same hearing:

¹ P.H./P.A. Trans. at 5.

MR. COOPER: And I will stipulate that it's a final decision for purposes of appeal as Mr. Burnett has indicated.²

Respondent then appealed the matter pursuant to K.S.A. 44-510k as a post-award medical hearing. The Board will review this matter pursuant to K.S.A. 44-510k. It is noted the medical exhibits to the hearing were stipulated into the record without the necessity of medical testimony, as would normally be required at a post-award medical hearing pursuant to K.S.A. 44-519.

ISSUES

The ALJ authorized neurological surgeon John Dickerson, M.D., to "perform any testing including any [MRIs] he may require, as well as any conservative treatment including physical therapy or injections." Any further surgery, the ALJ wrote, would require further determination from the court as to prevailing factor.

Respondent appeals, arguing Dr. Dickerson should not be authorized to treat claimant's lumbar spine because claimant failed to prove the services being provided by respondent are unsatisfactory. Respondent argues the ALJ erred in authorizing Dr. Dickerson and should have ordered respondent to provide the names of two physicians for claimant to choose from as mandated by statute.

Claimant argues the ALJ's Order should be affirmed.

FINDINGS OF FACT

Claimant suffered a work-related injury by accident on October 7, 2011, while working for respondent. In an Award dated August 7, 2015, claimant was awarded a 17 percent functional impairment to the body as a whole for his bilateral shoulder and lumbar spine injuries. The ALJ also awarded medical benefits as authorized medical treatment for the surgery performed by Dr. Dickerson. The matter was appealed to the Board which, in an Order dated January 26, 2016, affirmed the functional impairment award. Both the Board and the ALJ determined the medical treatment provided by Dr. Dickerson to be reasonably and medically necessary to cure and relieve claimant's left leg pain. However, the Board determined the medical treatment involving the surgery with Dr. Dickerson, was not authorized medical treatment. The Board ordered the payment for said treatment limited to the statutory \$500.00 for unauthorized medical treatment under K.S.A. 2011 Supp. 44-510h(b)(2).

Since the Award by the ALJ and the subsequent Order of the Board, claimant continued to receive treatment with Dr. Dickerson, again without a request for additional

² *Id.* at 6.

medical treatment before the ALJ. Dr. Dickerson examined claimant on March 2, 2015, with ongoing complaints of pain radiating from his left lateral thigh into his knee. Claimant was referred for physical therapy, with a return examination in 14 weeks. At the followup examination on August 6, 2015, claimant reported some low back pain with continued left leg pain. The medical report indicated claimant's pain increased after he was four-wheeling in Colorado.

On December 14, 2015, claimant reported ongoing left leg pain with limited range of motion in his low back. An MRI revealed moderate to severe foraminal stenosis on the left, at L4-5 and L5-S1. Dr. Dickerson recommended injections at L4-5 and L5-S1, with the future possibility of foraminotomies on the left at those same locations. Claimant was scheduled for a return appointment on March 10, 2016, but cancelled due to improved symptoms. However, claimant contacted the doctor on June 2, 2016, reporting renewed symptoms.³ Dr. Dickerson then recommended an updated lumbar spine MRI before making further recommendations.

The matter went to hearing on September 22, 2016, based upon claimant's request for additional medical treatment with Dr. Dickerson. Respondent scheduled claimant for a followup examination with Dr. Estivo on October 18, 2016. Claimant objected to the examination with Dr. Estivo, arguing he had no faith in Dr. Estivo's opinion because the doctor had failed to recommend surgery on claimant's low back prior to the original Award. Claimant contends Dr. Dickerson has greater expertise in this area and his original diagnosis was more accurate than that of Dr. Estivo.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2011 Supp. 44-501b(b)(c) states:

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

³ The June 6, 2016, medical report lists claimant's symptoms as being in the right buttock and leg. It then goes on to identify the symptoms as being consistent with claimant's initial office visit complaints. It would appear the listing of the symptoms on the right side, instead of the left side, is a reporting error.

K.S.A. 2011 Supp. 44-510k(a)(1)(2) states:

(a) (1) At any time after the entry of an award for compensation wherein future medical benefits were awarded, the employee, employer or insurance carrier may make application for a hearing, in such form as the director may require for the furnishing, termination or modification of medical treatment. Such post-award hearing shall be held by the assigned administrative law judge, in any county designated by the administrative law judge, and the judge shall conduct the hearing as provided in K.S.A. 44-523, and amendments thereto.

(2) The administrative law judge can (A) make an award for further medical care if the administrative law judge finds that it is more probably true than not that the injury which was the subject of the underlying award is the prevailing factor in the need for further medical care and that the care requested is necessary to cure or relieve the effects of such injury, or (B) terminate or modify an award of current or future medical care if the administrative law judge finds that no further medical care is required, the injury which was the subject of the underlying award is not the prevailing factor in the need for further medical care, or that the care requested is not necessary to cure or relieve the effects of such injury.

The ALJ did not address the issue of prevailing factor under K.S.A. 2011 Supp. 44-510k. However, both the Board and the ALJ earlier determined the treatment provided by Dr. Dickerson was both reasonable and necessary to relieve claimant of the effects of his work injuries. The determination by the ALJ to allow ongoing treatment by Dr. Dickerson indicates that issue was determined in claimant's favor. The Board agrees. Claimant's complaints have been consistent throughout this litigation, with symptoms in the low back and radiating into the left lower extremity.

Respondent argues the right to designate two doctors from which claimant would pick an authorized treating physician. While K.S.A. 2011 Supp. 44-510h allows for such a procedure, K.S.A. 2011 Supp. 44-510k gives the ALJ the authority to award future medical treatment post-award. While it is normally a respondent's right and responsibility to authorize the medical treatment under Kansas workers compensation law, it is the ultimate responsibility of the ALJ, under K.S.A. 44-510k, to make that determination.

The medical reports of Dr. Dickerson convince the Board claimant is in need of additional medical treatment. It is clear from this record claimant has little or no faith in the medical opinions of Dr. Estivo.

The ALJ found Dr. Dickerson to be the appropriate authorized medical provider, although with specific limitations on the degree of treatment being authorized. Any further surgery will require approval by the court. The Board finds the award of ongoing post-award medical treatment with Dr. Dickerson to be appropriate and affirms same.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the post-award Order of the ALJ should be affirmed for the above stated reasons.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the post-award Order of Administrative Law Judge Thomas Klein dated September 29, 2016, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of November, 2016.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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